



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

JRE
Docket No: 3165-98
28 January 2000

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: FORMER [REDACTED]
REVIEW OF NAVAL RECORD

Ref: (a) 10 U.S.C. 1552

Encl: (1) DD Form 149 w/attachments
(2) NPC ltr 5420 NPC-821/SER 009, 10 Mar 98
(3) Dir, NCPB ltr 5420 Ser:99-59, 19 Nov 99
(4) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that his naval record be corrected to show that he was permanently retired by reason of physical disability, vice being found fit for duty.

2. The Board, consisting of Messrs. [REDACTED] and [REDACTED] reviewed Petitioner's allegations of error and injustice on 13 January 2000 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Enclosure (1) was filed in a timely manner.

c. Petitioner reenlisted in the Navy on 31 December 1987. He was released from active duty on 26 March 1993, and transferred to the Temporary Disability Retired List the following day with a disability rating of 100% for testicular cancer. He underwent a periodic physical examination on 21 October 1994, and was given a diagnosis of Stage II-C pure seminoma, status post chemotherapy and radiation therapy, in remission. The examiner noted that Petitioner had "...some mild problems from the chemotherapy and radiation therapy to include mild anxiety and erectile dysfunction." On 16 December 1994, the

Record Review Panel of the Physical Evaluation Board (PEB) made preliminary findings that he was fit for duty. Petitioner disagreed with that finding and requested reconsideration. In addition, he inquired whether or not he would be considered fit to resume his duties in the nuclear field. On 23 January 1995, he was advised by the presiding officer of the PEB that the finding of fitness had been reconsidered and affirmed, and that Petitioner would not be assignable to the nuclear field, but could be assigned to a conventional machinist's mate's billet. On 30 January 1995, the PEB published a Notification of Decision letter announcing the finding of fitness, and advising the Chief of Naval Personnel to take action to reenlist Petitioner if he consented to reenlist. On 27 February 1995, the Bureau of Naval Personnel notified the Naval Reserve Personnel Command (NRPC) of the foregoing. No further action was taken until 2 March 1998, when the NRPC sent Petitioner a Notification of Options, advising him of his option to reenlist or be discharged from the Navy. On 16 March 1998, NRPC sent a letter to Petitioner inquiring about his intentions with regard to reenlistment. Petitioner did not reply to the letter by 15 June 1998, and he was discharged from the Navy effective 15 July 1998.

d. On 20 October 1995, the Department of Veterans Affairs (VA) awarded Petitioner a 20% rating for testicular cancer, status post removal of left testicle with azospermia and atrophy of the right testicle, and a 50% rating for a mood disorder with major depression secondary to use of a chemotherapeutic agent. The rating for depression was increased to 70% effective 20 November 1995, and Petitioner was found to be unemployable effective that date. The grant of service connection for depression was based, in part, on the VA's acceptance of the conclusion of Petitioner's Air Force oncologist expressed in a letter dated 29 June 1995, which is to the effect that Petitioner developed depression and cognitive deficits as a result of chemotherapy which he received in 1992.

e. On 10 March 1998, the Board was advised by the Assistant Branch Head, Disability Retirement/Limited Duty Branch, Naval Personnel Center (NPC), in effect, that in early 1995, Petitioner had a choice between reenlisting in the Navy or accepting discharge. Due to his non-response, he continued to receive his TDRL pay and other benefits of a military retiree until March 1998, the fifth anniversary of his transfer to the TDRL. His pay and benefits should have ceased 90 days after the January 1995 fit for duty finding. He received benefits he would not otherwise been entitled to had he responded as required. The fact that he was found fit for duty, but not qualified for duty in the nuclear field, is similar to what occurs to active duty members who are considered fit, but unable to screen for overseas duty or sea duty, making them candidates for administrative separation without benefits for being unable to meet all duty requirements.

f. On 19 November 1999, the Board was advised by the Director, Naval Council of Personnel Boards, in effect, that the findings that Petitioner's cancer was in remission as of 21 October 1994, and he had residuals limited to mild anxiety concerning the cancer and his future, support the finding of fitness for duty. According to his medical consultant(s), the chemotherapeutic agent given Petitioner is not commonly associated with psychiatric side effects, and in particular, there is no overt association with major depression; hence, he

believes the etiology of the depressive illness likely lies elsewhere, possibly related to family stressors and loss. The Director opined that "Petitioner's clinical state of depression/personality change and treatment with Cisplatin did not contribute to a separately unfitting degree in sufficient proximity to his discharge to warrant a retrospective change in his PEB findings."

g. DOD Instruction 1332.38 of 14 November 1996, part 6, paragraph B.4., provides, in effect, that conditions newly diagnosed during TDRL periodic physical examinations shall be compensable when the condition is unfitting, and was caused by the condition for which the member was placed on the TDRL, or directly related to its treatment.

CONCLUSION:

Upon review and consideration of all the evidence of record and notwithstanding the comments contained in enclosures (2) and (3), the Board concludes that Petitioner should have been permanently retired by reason of physical disability.

The Board rejects the position of the Commander, NPC, to the effect that Petitioner is at fault for his extended tenure on the TDRL. It appears that the Commander, NRPC took no action to notify Petitioner of his options for a period of about three years after he was found fit for duty, and that the Chief, Bureau of Naval Personnel and/or Commander, NPC, did not properly monitor the Commander, NRPC, to ensure that the matter was finalized in a timely manner. Although the available evidence does not demonstrate that Petitioner suffered from unfitting depression or cognitive deficits when he underwent his final periodic physical examination in October 1994, it is clear that he had become unfit by June 1995, when he was still on the TDRL. The Board concludes that given the determination of Petitioner's treating oncologist and the VA that his depression and cognitive deficits were related to the treatment for his testicular cancer, it would be in the interest of justice to resolve doubt in his favor, and grant his request. In the Board's opinion, his condition was ratable at 50% at the time of the removal of his name from the TDRL.

In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.


RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that he was permanently retired by reason of physical disability effective 24 March 1998, with a 50% rating under VA code 9434, for major depression.

b. That a copy of this Report of Proceedings be filed in Petitioner's naval record.

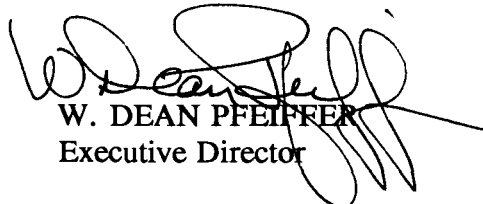
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder




JAMES R. EXNICIOS
Acting Recorder

5. The foregoing report of the Board is submitted for your review and action.



W. DEAN PFEIFFER
Executive Director

Reviewed and approved: FEB 16 2000



CHARLES L. TOMPKINS
Deputy Assistant Secretary of the Navy
(Personnel Programs)